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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DARRELL WILLIAMS, Defendant and Appellant.	B189388 (Los Angeles County Super. Ct. No. BA260309)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig E. Veals, Judge. Affirmed in part; reversed in part and remanded.

Janice M. Lagerlof, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

Darrell Williams was convicted of the first degree murder of Roy Edward Jackson (count 1), conspiracy to commit murder (count 5), the attempted premeditated murder of a John Doe victim (count 6), and firearms discharge and criminal street gang allegations. He was sentenced on count 1 to 25 years to life for first degree murder, plus 20 years for the firearms enhancement. Count 5 was stayed. A concurrent sentence was imposed on count 6.

Appellant contends: (1) The finding on count 6 that the attempted murder was willful, deliberate, and premeditated must be stricken, because there was no such allegation in the amended information. (2) The trial court should have granted his pretrial motion to exclude his incriminating statement of April 24, 2003 (the April 24 statement), as the statement resulted from falsity and implied promises of leniency by the homicide detectives. (3) At the hearing on the April 24 statement, the trial court erred in its rulings on the scope of cross-examination of appellant, in the event he elected to testify. (4) There was insufficient evidence to support the street gang finding. (5) The trial court improperly restricted defense cross-examination of the gang expert. (6) Cumulative error requires reversal.

We strike the premeditation finding on count 6, and otherwise affirm.

FACTS

1. Prosecution Testimony

Appellant was jointly charged with codefendant, Terrance Steele, but was tried separately. The murder victim, Jackson, was also known as "Bucky"; appellant, as "D Money"; and Steele, as "T.J."

Jackson died from a single .38-caliber gunshot wound. The bullet entered through the back of his neck and severed his spinal cord, causing him to fall immediately to the ground. It struck him while he, appellant, and Steele were simultaneously shooting at a gang member they believed was across the street. The death resulted from "friendly fire," as the bullet came from either appellant's gun or Steele's gun.

The evidence further showed: At 11:40 p.m. on February 15, 2003, police officers responded to a "shots fired" call at an address on West 47th Street, near Vermont.[1] They found Jackson lying face-up, dead, in a walkway on the north side of the street. On the ground near his right hand, there was a cocked .45-caliber semiautomatic handgun. It held four rounds of ammunition, and could hold a maximum of seven rounds. It had fired two .45-caliber bullet casings that the police found at the scene. There was evidence that at least two guns were fired. The location of bullet casings, bullet fragments, and impact marks showed that shots were fired from Jackson's side of the street, but not from the opposite side of the street.

The police initially suspected that the shooting was committed by Andre Griffen, also known as "Drae"; Michael McCullough, also known as "Mikey"; and Juan Mateo. They denied being at that location when Jackson was shot. They were arrested and later released.

A few days after the shooting, an anonymous tip led the police to an empty .38-caliber revolver, hidden near the crime scene. That gun fired the bullet that killed Jackson. It also fired two other bullets and two bullet fragments that were found at the scene.

The homicide investigation was assigned to Police Detectives Blair McCormack and Eric Holyfield.

Appellant's first contact with McCormack was on February 16, the day after the shooting. Appellant had been taken to the 77th police station by ambulance, after he was beaten up by people outside of Jackson's home. His clothing was torn, and he had a cut over his eye. He told McCormack that the attackers had accused him of killing Jackson. He also said he did not know the reason for that accusation.

On February 26, appellant told McCormack and Holyfield that he was not present when Jackson was shot. He agreed to meet the following day with Jackson's mother,

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1 All subsequent events occurred in 2003 unless otherwise specified.

Mrs. R., at a church. The detectives had a tape recorder hidden during that meeting, but did not hear what was said, because the tape that was produced was inaudible.

The detectives reinterviewed appellant on April 24. On that occasion, he waived his *Miranda* rights[2] and made an extremely detailed statement, which the jury heard at the trial. The April 24 statement showed the following:

Appellant arrived at Jackson's house about 9:00 p.m. on the night of the shooting. Jackson and Steele were present, as was a man named "Bobcat," who belonged to the "60's" gang. Appellant had been drinking liquor. The men discussed their anger with Griffen, McCullough, and Mateo, who had been shooting at people, and were suspected of killing an "old lady" in front of a liquor store. Two months earlier, McCullough and Griffen had knocked appellant down and stomped on him, breaking his teeth. Jackson and Steele decided "to get at" McCullough, Griffen and Mateo, by "going to shoot at them." They sent Bobcat in his car, alone, to see if their intended victims were "out there." Bobcat reported that he had seen McCullough and nine or 10 members of the Hoovers gang. Jackson already had a gun, a .45-caliber automatic weapon. Steele got two guns from the back of the building, and gave one of them to appellant. One of those guns was a .38-caliber revolver. Appellant thought about going home, but then decided to participate in the scheme. During the discussion, Jackson and Steele did most of the talking, as appellant had not "been active in a long time."

The April 24 statement continued: Appellant stayed at Jackson's house while Jackson, Steele and Bobcat used bolt cutters to cut the lock on a gate. When those three returned, Bobcat stayed at Jackson's house, and appellant left with Jackson and Steele. Appellant, Jackson and Steele walked through the gate with the broken lock, went down an alley, and hid in some bushes. Appellant saw somebody standing across the street. He thought the person probably belonged to the Hoovers gang, as he was not McCullough, Griffen, or Mateo. Appellant, Jackson and Steele stood up, next to each

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

other. Jackson was in the middle, appellant was on Jackson's right, and Steele was on Jackson's left. Appellant was left-handed, and held his gun in his left hand. He was six feet three inches tall. Jackson was about three inches shorter. Jackson said, "[O]n the count of three." Those were the last words appellant heard from him.

The April 24 statement went on: The three men fired their guns. Appellant fired four or five shots, Jackson fired six or seven, and Steele fired three or four. The people across the street fired back about eight times. When appellant finished firing his gun, Jackson was still shooting.[3] Appellant and Steele ran back to Jackson's house. Steele took the gun back from appellant. Appellant was concerned that Jackson had not run from the scene. He walked back towards it. He was surprised to see that Jackson was lying on the ground, the police were present, and Jackson's mother was screaming. Appellant returned to Jackson's house. Steele was telling people there that appellant accidentally shot Jackson. Appellant went home. The next day, he went to the home of Jackson's mother. Steele and other people accused him of killing Jackson, and attacked him. Jackson's mother called the police.

At the conclusion of the interview, the detectives told appellant that they were taking him home, and did not know what the district attorney's office would do with the case.

Ten months later, an arrest warrant was issued, and appellant was arrested.

At the trial, there also was extensive testimony from Jeremy Duncan, a police gang expert who worked in that area. He explained that appellant, Jackson and Steele belonged to the Top Dollar Hustlers gang, while McCullough, Griffen and Mateo belonged to a competing gang called the Bounty Hunters. In Duncan's opinion, the crimes resulted from warfare between those gangs, and were committed for the benefit of the Top Dollar Hustlers. Further details of his testimony will be provided, *post*.

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3 Parts of appellant's statement are contradicted by the presence of four bullets in Jackson's gun, and the lack of evidence that shots were fired from across the street.

2. Defense Testimony

When called as a witness by defense counsel, Holyfield discussed problems with some of the recordings in this case. Holyfield denied that he gave appellant any details about the incident.

Appellant testified in his own defense. He admitted that he had previously been convicted of a felony, sale of narcotics. He said he had previously lived in that area, but was not living there in 2003, when Jackson was shot. He joined the Top Dollar Hustlers in 1995, but stopped participating in the gang's activities in 2002. He was in the area that evening to visit his aunt, but left and went home, around 9:00 p.m. The next day, he heard that Jackson had been killed. People attacked him and falsely accused him of committing the crime. At Holyfield's suggestion, he met with Mrs. R. at the church, to provide closure, and to help her with a life insurance claim for Jackson. He never told Mrs. R. that he was present when Jackson was killed. He made the April 24 statement after the detectives told him they needed it, to make sure that the shooting was accidental, so that Mrs. R. could recover on the insurance policy.

On cross-examination, appellant explained that the felony conviction occurred in March 2001, while he was still active in the gang. He decided to leave the gang after he was released from jail in 2002. He went to the area on the day after the shooting because Jackson had been a close friend, and he wanted to find out what had happened. He was shocked when people accused him of killing Jackson. He made the statement on April 24 because he had already told the detectives he was not involved, and decided on that day that he "just wanted to get it over with." He made up everything in the statement, except that he really had been beaten up by Griffen and McCullough, two or three months before Jackson was shot. He based the statement on facts that he learned through conversations with the detectives and his friends. He knew that the Top Dollar Hustlers had an ongoing feud with the Bounty Hunters, and the two gangs were shooting at each other, but he denied any involvement in that conflict.

DISCUSSION

1. The Missing Allegation on Count 6

The penalty imposed on count 6 was based on the jury's finding that the attempted murder was willful, deliberate, and premeditated. There was no such allegation in the amended information. Appellant contends that the lack of such an allegation (hereafter called, for simplicity, a premeditation allegation) means that his sentence on count 6 violated his Fourteenth Amendment right to due process of law, and the express requirements of Penal Code section 664, subdivision (a) (§ 664(a)).[4] Respondent counters that the life sentence imposed for the premeditation allegation was proper, because the defense proceeded on the assumption that there was a premeditation allegation on count 6, the jury made a true finding on the nonexistent allegation, and the trial court properly added it, via amendment, at the sentencing hearing.

A. Section 664(a)

Section 664(a) states: "If the crime attempted is punishable by imprisonment in the state prison, the person guilty of the attempt shall be punished by imprisonment in the state prison for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. However, if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. If the crime attempted is any other one in which the maximum sentence is life imprisonment or death, the person guilty of the attempt shall be punished by imprisonment in the state prison for five, seven, or nine years. The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact."

Thus, section 664(a) sets forth a harsher penalty "if the crime attempted is willful, deliberate, and premeditated murder," but that penalty can only be imposed if that fact "is

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4 Subsequent code references are to the Penal Code unless otherwise stated.

charged in the accusatory pleading." Despite the clarity of the statutory language, there are circumstances in this case that make the issue more complicated.

B. The Record

The problem may have arisen from differences between the original information and the amended information. Both documents alleged the murder of Jackson in count 1, conspiracy to commit murder in count 5, and the attempted murder of a John Doe victim in count 6. Count 6 never contained a premeditation allegation. The original information also contained counts 2, 3, and 4, which alleged the attempted murders of McCullough, Griffen, and Mateo, and contained premeditation allegations for those counts. Counts 2 through 4 were stricken on a defense motion pursuant to section 995. The result was that the only attempted murder count before the jury was count 6, which was renumbered as count 3, and which did not contain a premeditation allegation. The People could have elected to add a premeditation allegation to that count, as had previously been done with counts 2 through 4, but did not do so.

During a discussion of the jury instructions that should be given "in the context of count 1," defense counsel stated: "It sounds to me like the People are asking for first degree premeditated attempt intent to kill with premeditation transferred intent." (*Sic*.) Respondent argues before this court that the quoted statement shows that defense counsel knew that the attempted murder count included a premeditation allegation. We do not so construe counsel's statement, as the context was count 1, not count 6, and the sentence makes no sense unless the word "attempt" was a slip of the tongue that defense counsel immediately corrected with the similar-sounding word, "intent."

As respondent emphasizes, the jury was instructed that the attempted murder charge contained a premeditation allegation, and made an express finding on that issue, with no objection by defense counsel. The instruction that was given on the attempted murder count included this sentence: "It is also alleged in Count III that the crime attempted was willful, deliberate, and premeditated murder." That sentence was obviously incorrect, as there was no such allegation, but it appears that nobody realized the error at that time. The instruction went on to fully define the pertinent terms. The

verdict form on count 3 requested a finding on whether the attempted murder was willful, deliberate, and premeditated. The jury responded with a true finding. It was discharged after the verdict.

At the hearing on appellant's motion for new trial, defense counsel argued that the sentence on count 6 could not include the finding that the attempted murder was willful, deliberate and premeditated, because of the lack of a premeditation allegation. The prosecutor stated that he first became involved with the case at the time of the trial. He submitted the issue, without conceding it. Prompted by the court, he asked for an amendment of the information to include a premeditation allegation, even though he questioned whether such an amendment could be made after the jury had been discharged. Defense counsel objected to the amendment. The prosecutor insisted that the defense knew that the People were relying on a transferred intent theory, to show that both the murder and attempted murder were willful, deliberate and premeditated. Defense counsel pointed out that there also was no premeditation allegation on count 1, murder.

The trial court ruled that the problem was "just procedural," and did not implicate appellant's "substantial rights," for these reasons: it had been "everyone's understanding" that the requisite allegation was present; the jury had been properly instructed; the jury had found that the attempted murder was willful, deliberate and premeditated; and it was possible that the missing allegation had been added at some point by an amendment that was not put into writing on the amended information.

The sentence that was imposed on count 6 was life imprisonment, plus 20 years for firearms discharge, to run concurrent with the sentence imposed on count 1.

C. Analysis

Respondent complains that there was no objection to the instruction that stated there was a premeditation allegation on count 6, or to the verdict form that requested a finding on the nonexistent allegation. (See *People v. Toro* (1989) 47 Cal.3d 966, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.) The lack of an objection is not surprising, as it appears that all of the parties shared a

mistaken belief that count 6 included a premeditation allegation. In any event, legal error that results in an unauthorized sentence can not be waived. (*People v. Mancebo* (2002) 27 Cal.4th 735, 749-750, fn. 7 (*Mancebo*).)

Respondent also argues that an information may be amended "at any stage of the proceedings . . . unless the substantial rights of the defendant would be prejudiced thereby . . . ." (§ 1009; see also § 960; *People v. Thomas* (1987) 43 Cal.3d 818, 828; *People v. Carr* (1988) 204 Cal.App.3d 774, 780, fn. 7.) We have no doubt that appellant's substantial rights were prejudiced, since the amendment resulted in a life term for an allegation that did not exist at the time of the trial. Moreover, the authorities cited by respondent do not involve an explicit charging requirement like that of section 664(a).

Mancebo, *supra*, 27 Cal.4th 735 demonstrates the error in the belated addition of a premeditation allegation to count 6. That case involved section 667.61, the "One Strike" law, which imposes harsher sentences for certain sex crimes. The defendant was charged with and convicted of multiple sex crimes against two different victims. The information did not expressly allege a multiple victim circumstance, as one of the "minimum number of circumstances" that section 667.61, subdivision (f) requires, for application of the harsher penalties of section 667.61. Even so, the trial court utilized multiple victims as one of the minimum number of circumstances, so that it did not need to utilize a gun use circumstance that was alleged for that purpose, and had gun use available for separate enhancements under section 12022.5.

Mancebo held that utilization of a circumstance that was not alleged to meet the minimum number of circumstances requirement violated the plain language of subdivision (i) of section 667.61, which states that the requisite facts must "be alleged in the accusatory pleading," and subdivision (f) of section 667.61, which states that the "minimum number of circumstances" must be "pled and proved." (*Mancebo, supra*, 27 Cal.4th at p. 745.) The procedure the trial court used also violated the defendant's "cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*Id.* at pp. 747, 753.)

Section 664(a) contains a similarly explicit pleading requirement, as it states: "The additional term . . . for willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading . . . ." Moreover, under *Mancebo*, *supra*, 27 Cal.4th at page 754, appellant's right to "fair notice of the qualifying statutory circumstance" was violated through the absence of the allegation that is required for imposition section 664(a)'s additional term.

We therefore strike count 6's finding that the attempted murder was willful, deliberate, and premeditated.

2. The Voluntariness of the April 24 statement

In the April 24 statement, appellant said that he was present with Jackson and Steele, and admitted that the three of them simultaneously fired their guns across the street, but did not admit that he actually shot Jackson. Prior to trial, appellant sought to suppress the April 24 statement, on the ground it was involuntary, and the product of coercion, promises and improper police tactics. The trial court found that the statement was voluntary, after hearing evidence at a pretrial Evidence Code section 402 hearing (the 402 hearing). Appellant attacks that ruling.

A. The 402 hearing

Detective McCormack testified that he spoke with appellant at the police station on April 24, during working hours. Appellant was not in handcuffs. He was told that he was not under arrest, would not be arrested, and would be returned home after the interview. According to McCormack, appellant was free to leave.[5] McCormack read appellant his *Miranda* rights, and appellant waived them. After appellant made the statement, he was allowed to go home, as promised.

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[5] Although we question whether appellant could actually have walked away from the interview, that fact is not dispositive.

On cross-examination, McCormack testified that appellant had not been given his *Miranda* rights during previous contacts with him on February 16 (the day after the homicide) and on February 26 or February 27.

Appellant was not considered a suspect on February 16, and denied any involvement in the shooting.

On February 26 or February 27, he was a possible suspect. The detectives picked him up at his home on February 26, as he had agreed to take a polygraph test.[6] They drove him to Parker Center (police headquarters), but he then decided not to take the test. He agreed to meet Mrs. R. the next day at a church, "to explain what had happened to her son." The hidden tape recorder at that meeting produced an inaudible tape. McCormack had hoped that it would produce a description of the incident. He "may have" told appellant that one purpose of the meeting was to assist Mrs. R. to recover on a life insurance policy she had for Jackson. He also "may have" explained to appellant "that there's a difference as far as life insurance whether it is an accidental death or a homicide." He "may have" talked to a representative from a life insurance company, as that was a normal occurrence for homicide detectives.

McCormack further testified that the reinterview on April 24 occurred because the district attorney's office "wanted another interview or further investigation with Mr. Williams." The detectives picked up appellant at his home. They did not tell his mother that he would not be arrested, or that the interview was solely for the purpose of insurance. On the way to the station, they told appellant that they had to talk to him again but "he wasn't under arrest, he was going [to] go home." They planned to take him home after the interview, and did so, as they wanted to see what the district attorney's office decided to do with the results of the interview. Appellant was given his *Miranda* rights and knew that the interview was recorded. They told him that they already knew what had happened from interviewing witnesses, but had a problem with conflicts between what he had told them and what Steele had said.

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6 The jury did not hear anything about a polygraph test.

Defense counsel then called Detective Holyfield. He recalled talking about insurance with Jackson's mother, Mrs. R., but did not recall ever discussing that subject with appellant or with appellant's mother. Mrs. R. had told him that she was acquainted with appellant and other people who were present when her son was shot, but had no real information about the incident. Holyfield knew that appellant wanted to talk with Mrs. R. in a "neutral location," as appellant had been unable to talk with Mrs. R. when he went to her home on the day after the shooting. Holyfield proposed that appellant meet with Mrs. R. the following day, at the church. He told appellant that the meeting would provide "closure" for Mrs. R. He did not say that he also hoped the meeting would produce the truth about the shooting.

Holyfield further testified that he telephoned appellant on April 24 and asked him to come to the station for questioning. Appellant was a suspect, but Holyfield did not tell him that. He told appellant that the district attorney's office had requested a reinterview, and appellant would be returned to his home after the interview. Holyfield admitted that it was not true that the district attorney's office had requested the reinterview. The truth was that the detectives had previously discussed the case with a deputy district attorney, and they were supposed to conduct as much investigation as possible.

Appellant's mother testified that the detectives told her, both on the day before the meeting at the church, and when they picked up appellant on April 24, that he was not a suspect, and he was being interviewed to assist Mrs. R. with the insurance claim. She also testified that Holyfield told her on April 24 to tell appellant not to worry, as he would not be charged with any crimes.

Appellant did not testify at the 402 hearing, for reasons that will be discussed later in this opinion.

After hearing arguments from counsel, the trial court found that the April 24 statement was voluntary. It did not believe the testimony of appellant's mother that the officers promised that appellant would not be prosecuted. It also did not think that appellant could reasonably believe he would not be prosecuted if he admitted firing a gun at people. The court did not think it was important that the detectives told appellant that

the district attorney's office had requested the reinterview, even though no such request had been made.

B. Analysis

The United States and California Constitutions preclude utilization of an involuntary confession. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 15.) The prosecution has the burden to establish that a confession was voluntary. Voluntariness is determined from the totality of the circumstances. The reviewing court will uphold the trial court's factual findings if supported by substantial evidence, but utilizes independent review on the question of whether the confession was voluntary. (*People v. Holloway* (2004) 33 Cal.4th 96, 114; *People v. Sapp* (2003) 31 Cal.4th 240, 267.)

Appellant was fully advised of his *Miranda* rights on April 24, and voluntarily waived them. He showed no desire to end the interview. The detectives were free to reinterview him on their own initiative, so it is not significant that they falsely told appellant that the reinterview had been requested by the district attorney's office. The detectives promised to take appellant home after the interview, and did so. That promise was not a "promise[] of leniency sufficient to render the subsequent admissions involuntary," as appellant was not " 'given to understand that he might reasonably expect benefits in the nature of more lenient treatment . . . in consideration of making a statement . . . .' " (*People v. Holloway, supra*, 33 Cal.4th at p. 115.) The detectives told appellant the truth, that it was up to the district attorney's office to decide whether he would be prosecuted. The only evidence that the detectives said appellant would not be prosecuted came from appellant's mother, whom the trial court did not believe.

There is some ambiguity in the record regarding whether or not the detectives discussed Mrs. R.'s insurance claim with appellant. Even if they did, discussion of that topic would not make the April 24 statement involuntary. " 'Once a suspect has been properly advised of his rights, he may be questioned freely so long as the questioner does not threaten harm or falsely promise benefits.' " (*People v. Holloway*, *supra*, 33 Cal.4th at p. 115, quoting *People v. Andersen* (1980) 101 Cal.App.3d 563, 576.) There was neither a threat of harm nor a false promise of benefits here. Appellant chose to make a

statement that included certain self-serving facts, such as that Jackson was still shooting when appellant stopped shooting, and shots were fired from across the street. We agree with the trial court that the April 24 statement was voluntary.

3. The Ruling on Cross-examination of Appellant at the 402 Hearing

Appellant testified at the trial, but not at the 402 hearing. He maintains that the trial court made erroneous rulings that resulted in his decision not to testify.

After appellant's mother testified, defense counsel sought a ruling that, if appellant took the witness stand, he could be cross-examined about the circumstances of the April 24 interrogation, but not about the facts of the incident. The defense offer of proof was that appellant would testify that the detectives told him that he would not be prosecuted, and that he was being interviewed to resolve the matter of Mrs. R.'s insurance claim. The prosecutor argued that such testimony would permit cross-examination on conversations appellant had with other people, which showed his knowledge of the facts of the incident. The trial court recognized that the limited purpose of the 402 hearing meant that there would be restrictions on the People's inquiry. Still, "[t]o the extent that the defendant would waive his right against self-incrimination the People certainly have a right to inquire into a good deal of information . . . ." It ruled that if appellant waived his right against self-incrimination, it would make "a point by point assessment" of relevancy, as to the questions on cross-examination. It told defense counsel to make a choice, but that there was "some peril involved" if appellant testified, as the cross-examination might lead to an incriminating disclosure.

A recess ensued so that defense counsel and appellant could discuss the problem. After the recess, defense counsel said that, since the court had ruled that appellant's testimony might expose him to questioning about the incident, he would not be called as a witness. The court responded that what it would allow on cross-examination would depend on the question that was asked. It also thought that the proposed testimony by appellant was duplicative of the testimony of his mother, and would be self-serving. The defense rested at that point.

We find no error in the trial court's rulings. Appellant's credibility would be at issue if he testified at the 402 hearing, so he properly could be impeached with prior statements he had made. (*People v. Boyette* (2002) 29 Cal.4th 381, 414-415.) His statements at the 402 hearing could not be used to prove his guilt in the People's case-in-chief at the trial, but could be used to impeach him at the trial, if his testimony there was inconsistent with his testimony at the 402 hearing. (*Id.* at pp. 414-415.) Contrary to what appellant's counsel said, the trial court did not find that appellant could be questioned about the facts of the incident. It ruled that it would make a question-by-question determination of the propriety of the questions the prosecutor asked during cross-examination. That ruling was imminently appropriate.

Appellant further contends that his counsel rendered constitutionally ineffective assistance, because he did not understand the way appellant's testimony at the 402 hearing might be used at the trial. We reject the contention, as the record does not show any conduct by defense counsel that met the standard of *Strickland v. Washington* (1984) 466 U.S. 668, 689.

4. Sufficiency of the Evidence for the Street Gang Allegation

As to all three counts, the jury found true a criminal street gang allegation, pursuant to section 186.22, subdivision (b)(1). That subdivision provides for an enhanced penalty, if a defendant is convicted of a felony that is "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. . . ."

Applying the appropriate standard of review (*People v. Catlin* (2001) 26 Cal.4th 81, 139), we find that there was sufficient evidence to support the street gang allegation, through the combination of appellant's April 24 statement and the testimony of the gang expert.

The gang expert testified that Jackson, Steele and appellant belonged to the Top Dollar Hustlers gang, which had, as it primary activities, "murder, driveby shootings, walk-up shootings . . . robberies, narcotic sells [*sic*] and also graffiti. . . ." It operated in a

four-square-block territory, around 47th Street and Vermont. It was not specifically a Crips or Bloods gang. Members of the Top Dollar Hustlers that the expert named had been convicted of shooting at an inhabited dwelling and possession of cocaine base for sale. At the time Jackson was shot, the Top Dollar Hustlers was embroiled in a feud with a gang called the Bounty Hunters. The Bounty Hunters was a Bloods gang that was centered in Watts, except that three of its members were selling narcotics and carrying guns at two buildings in the territory of the Top Dollar Hustlers. Those three Bounty Hunters were McCullough, Griffen, and Mateo. McCullough and Griffen had grown up in the Top Dollar Hustlers' territory and formerly belonged to that gang, but had changed their allegiance to the Bounty Hunters. The Top Dollar Hustlers and the three members of the Bounty Hunters who were in that territory actively shot at each other, sometimes on a daily basis. An additional complication was that Jackson had decided to align the Top Dollar Hustlers with the Rollin 40's Neighborhood Crips, which had a feud with another gang, the Hoovers. Therefore, the Top Dollar Hustlers and the Hoovers were enemies.

In the opinion of the gang expert, if three members of the Top Dollar Hustlers procured weapons, snuck up on members of the Bounty Hunters, and opened fire on them, the Top Dollar Hustlers would benefit, because the gang's territory would be protected, citizens in the area would be too frightened to report crimes, and the shooters would earn increased respect within their gang. Also, if a gang did not retaliate for an assault by a rival gang, it would lose respect. If appellant shot at Hoovers, and not Bounty Hunters, the crime would still benefit the Top Dollar Hustlers, because the Hoovers were also its enemy.

We consider that testimony by the expert in conjunction with appellant's April 24 statement. Appellant said that he, Jackson and Steele planned to shoot at McCullough, Griffen and Mateo, in retaliation for past violence; a gang member named Bobcat verified that McCullough was "out there" with Hoovers gang members; appellant walked to the scene with Jackson and Steele, and hid there; appellant thought he saw a Hoovers gang member across the street, and he, Jackson and Steele stood up and simultaneously fired

their guns. The expert's testimony helped to explain why appellant and his companions started to fire at a suspected Hoover gang member, when their real target was McCullough. The combination of the expert's testimony and the April 24 statement amply supported the gang allegation. (See *People v. Morales* (2003) 112 Cal.App.4th 1176, 1197-1199.)

Appellant emphasizes specific testimony by the expert on cross-examination, indicating that it would not benefit the Top Dollar Hustlers to accidentally kill a member of that gang and, more specifically, that it would not benefit the Top Dollar Hustlers if either appellant or Steele killed Jackson, accidentally. That testimony does not show that the evidence for the gang allegation was insufficient, because appellant intended to shoot at a person across the street, and that intent applied to the accidental shooting of Jackson, through the doctrine of transferred intent.

5. Restrictions on Cross-examination of the Gang Expert

Finally, appellant argues that the gang enhancement must be stricken because the trial court placed restrictions on cross-examination of the gang expert that resulted in a violation of the Sixth and Fourteenth Amendments to the United States Constitution.

Prior to the trial, the court ruled that there would be no evidence that two people falsely told the police that they saw McCullough, Griffen, and Mateo chase down and shoot Jackson.

During cross-examination of the expert, defense counsel began to ask, "Did you read the statements of any individuals --." The prosecutor immediately objected and asked to approach the bench. Counsel for both sides discussed the false statements of the two witnesses, which temporarily had resulted in the arrest of McCullough, Griffen and Mateo. Defense counsel argued that he was entitled to ask the expert if he had read those witness statements, and if they affected his opinion that the crime was committed for the benefit of the Top Dollar Hustlers. The prosecutor countered that, if defense counsel could do that, he should be allowed to put into evidence Steele's statement to the police, indicating that appellant killed Jackson. The trial court did not think evidence that a witness identified somebody else was relevant to the expert's opinion. It permitted the

402 hearing regarding what the expert had considered. At that hearing, the expert testified that he had read part of the transcript of appellant's April 24 statement, but none of the witness statements. Defense counsel submitted the issue at that point. Before the jury, the expert testified that, in addition to reading part of the April 24 statement, he had discussions with the detectives and with Griffen and McCullough, but he did not speak to any of the witnesses. No further questions were asked about the false witness statements.

We find no error in the rulings on this issue. It appears that defense counsel was trying to create doubt in the jurors' minds by using cross-examination of the expert to bring in otherwise inadmissible hearsay, the fact that certain witnesses had identified McCullough, Griffen and Mateo as the killers of Jackson. The trial court properly refused to permit questioning about witness statements the expert had not considered, and which were unreliable. (See *People v. Boyette*, *supra*, 29 Cal.4th at p. 449.)

6. Cumulative Error

In the reply brief, appellant adds that the combination of errors in his case resulted in a denial of his fundamental constitutional rights. We do not agree, as the only error concerned the premeditation allegation on count 6.

DISPOSITION

The finding on count 6 that the attempted murder was willful, deliberate, and premeditated is reversed. Count 6 is remanded for resentencing, consistent with this opinion. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

COOPER, P. J. RUBIN, J.